

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



# TRANSCRIPT OF RECORD.

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## Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2038 **650**

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EDMUND K. FOX, TRADING UNDER THE FIRM NAME  
AND STYLE OF A. F. FOX COMPANY, APPELLANT,

*vs.*

JEANNETTE COHEN AND LILLIE COHEN.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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FILED JUNE 28, 1909.

# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2038.

EDMUND K. FOX, APPELLANT,

*vs.*

JEANETTE COHEN AND LILLIE COHEN, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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# In the Court of Appeals of the District of Columbia.

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No. 2038.

EDMUND K. FOX, Trading, &c., Appellant,  
*vs.*

JEANNETTE COHEN ET AL.

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*a* Supreme Court of the District of Columbia.

At Law. No. 50368.

JEANETTE COHEN and LILLIE COHEN, Plaintiffs,  
*vs.*

EDMUND K. FOX, Trading and Doing Business under the Name and  
Style of A. F. Fox Company, Defendant.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of  
Columbia, at the City of Washington, in said District, at the times  
hereinafter mentioned, the following papers were filed and proceed-  
ings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed March 19, 1908.

In Justice's Court of the District of Columbia, Sub-district No. —.

No. 50368.

JEANETTE COHEN and LILLIE COHEN, Plaintiffs,  
*vs.*

EDMUND K. FOX, Trading under the Firm Name and Style of A. F.  
Fox Company, Defendant.

The plaintiffs, Jeanette and Lillie Cohen, sue the defendant for  
the sum of one hundred dollars, with interest thereon at the rate of  
six per cent. per annum from September 1st, 1907, besides costs,  
according to the Bill of Particulars hereto annexed.

HAMILTON, COLBERT, YERKES &  
HAMILTON,  
*Attorney- for Plaintiffs.*

*Bill of Particulars.*

Edmund K. Fox, Trading as A. F. Fox Company, to Jeanette and  
Lillie Cohen, Dr.

September 1st, 1907:

To deposit received by said Edmund K. Fox from John  
Milton Waldron as a deposit to be applied as part pur-  
chase of house and premises No. 602 R street Northwest,  
which deposit was forfeited by the said Waldron . . . . . \$100.00

HAMILTON, COLBERT, YERKES &  
HAMILTON,  
*Attorney- for Plaintiffs.*

*Summons.*

Issued March 4, 1908.

In Justice's Court of the District of Columbia, Sub-district No. 1.

50368. No. 12280.

JEANETTE COHEN and LILLIE COHEN, Plaintiffs,  
*vs.*

EDMUND K. FOX, Trading as A. F. Fox Company, Defendant.

The President of the United States to the defendant, Greeting:

You are hereby summoned to appear in this Court on the 14th  
day of March, A. D. 1908, at 10 o'clock A. M., to answer the plain-  
tiffs' suit against you for \$100 with interest from September 1st,  
1907, with interests and costs.

Given under my hand and seal this 4th day of March, A. D. 1908.

CHARLES S. BUNDY, [SEAL.]  
*Justice of the Peace.*

Address No. 416-18 5th St., N. W., Columbian Building.

*Marshal's Return.*

WASHINGTON, D. C., *M'ch* 6'', 1908.

Summoned as within directed:

AULICK PALMER,  
*U. S. Marshal,*  
By J. A. WATTS, *Deputy.*

3

*Defendant's Pleas.*

Filed March 19, 1908.

In Justice's Court of the District of Columbia, Sub-district No. 1.

50368. No. 12280.

JEANNETTE COHEN and LILLIE COHEN, Plaintiffs,

vs.

EDMUND K. FOX, Trading under the Firm Name and Style of A. F.  
Fox Company, Defendant.

1. The defendant, Edmund K. Fox, for a plea to the declaration herein and to this action, says that he did not promise in manner and form as herein alleged.

2. And for a further plea herein said defendant says that he is not indebted to the said plaintiffs in manner and form as herein alleged.

3. And for a further plea herein said defendant says that the said plaintiffs prior to the commencement of this suit, were indebted to the defendant in the sum of \$168, and still are indebted to the defendant in the sum of \$68, for that the defendant is a real estate broker or agent and prior to the commencement of this suit was employed by the plaintiffs, as such real estate broker or agent, to find for said plaintiffs a purchaser for premises No. 602 R Street, Northwest, in the City of Washington, District of Columbia. And

4 thereupon plaintiffs promised to pay to defendant, when a contract for the purchase of said premises should be procured by said defendant and accepted by plaintiffs, the usual and ordinary commission or reward for such services, which is 3% upon the purchase price of said premises. And the defendant did, on to wit, May 22, 1907, procure a person who was able and willing, and who offered to purchase said property, and defendant procured the execution of a valid and binding contract for the purchase thereof, at the price of \$5,600, between plaintiffs and said person so procured by defendant to contract for the purchase of said property.

Wherefore defendant says that there is now justly due and owing, from plaintiffs to defendant, the sum of \$168, which is 3% upon the agreed purchase price of said premises, and which is a fair and reasonable charge for the aforesaid services of defendant, less \$100 which defendant received as a deposit on account of said purchase, and which deposit was forfeited by said purchaser and has been applied by defendant on account of his said commission as appears by the particulars of said indebtedness hereto annexed; and defendant is willing that the same may be set-off against plaintiffs' demand, and prays judgment herein for \$68, the unpaid balance of his said commission, with interest thereon from May 22, 1907.

P. H. MARSHALL,

*Attorney for Defendant.*

*Particulars of Indebtedness.*

Jeanette and Lillie Cohen to Edmund K. Fox, Dr.

To commission due said Edmund K. Fox for procuring the acceptance and execution of a contract for the purchase of premises No. 602 R Street, Northwest, Washington, D. C.; 3% on agreed purchase price of \$5,600..... \$168.00

Cr.

Amount of deposit forfeited by John Milton		
Waldron under said contract of purchase....	\$100.00	
Balance due .....	68.00	
	<hr/>	<hr/>
	\$168.00	\$168.00

Interest on \$68 from May 22, 1907.

*Certificate of Justice of the Peace on Appeal.*

Filed March 19, 1908.

In Justice's Court of the District of Columbia, Sub-District No. 1.

No. 12280. 50368.

JEANNETTE COHEN and LILLIE COHEN, Plaintiffs,

vs.

EDMUND K. FOX, Trading under the Firm Name and Style of A. F. Fox Company, Defendant.

Date.	Proceedings.
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1908.

March 4. Plaintiff made deposit on account of costs.

" " Issued summons returnable March 14 10 A. M.

" 6. Summons served as directed.

" 14. Parties appeared and joined issue, and went to trial. Testimony heard, and cause argued by counsel and submitted.

" " Judgment reserved and cause continued C. C. to March 16th 1 P. M.

" 16. Parties appeared and judgment entered for plaintiff for \$100 debt with interest from September 1st, 1907, and costs of suit.

" " Appeal noted by defendant.

" 17. Appeal perfected, with Fred. R. Walker, surety on the undertaking which was approved by me after due notice.



I, Charles S. Bundy, Justice of the Peace in and for the said Sub-District, do hereby certify that the foregoing is a true copy of my Docket entries and of all the proceedings had before me in the above cause, and that the annexed documents are all the original papers filed in said cause.

7 Given under my hand this 17th day of March, A. D. 1908.

CHARLES S. BUNDY, [SEAL.]  
*Justice of the Peace.*

Costs paid by Plaintiff.....	\$2.10
Costs paid by Defendant.....	1.00

(Endorsed:) The Clerk will please docket this appeal, enter my appearance and issue Summons to Ap-eele. P. H. Marshall, Att'y for Appellant.

*Order for Appearance.*

Filed March 20, 1908.

In the Supreme Court of the District of Columbia, the 20th Day of March, 1908.

At Law. No. 50368.

LILLIE COHEN and JEANNETTE COHEN  
*vs.*

EDMUND K. FOX, Trading as A. F. Fox Co.

The Clerk of said Court will enter my appearance for plaintiffs (appellees).

M. J. COLBERT,  
*Attorney for Appellees.*

8 *Memorandum.*

March 18, 1909.—Verdict for plaintiffs for \$100.00.

Supreme Court of the District of Columbia.

FRIDAY, April 2d, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

\* \* \* \* \*

Before Judge Anderson.

No. 50368. At Law.

JEANNETTE COHEN and LILLIE COHEN, Plaintiffs,  
*vs.*

EDMUND K. FOX, Trading as A. F. Fox Company, Def't.

Come now the plaintiffs by their attorney and in open court remit Three Dollars of the verdict rendered herein.

Upon consideration of the motion for a new trial filed herein, it is ordered that said motion be, and the same is hereby overruled, and judgment on verdict is ordered, whereupon, it is considered and adjudged that the plaintiffs herein recover of defendant herein and

9 Fred R. Walker and Albert F. Fox his sureties the sum of Ninety Seven (97) Dollars, with interest from this date, together with costs of suit to be taxed by the Clerk, and have execution thereof.

From the foregoing, the defendant by his attorney in open court notes an appeal to the Court of Appeals, and the penalty of a bond to operate as a supersedeas, is hereby fixed in the sum of Five Hundred Dollars.

Further this term is hereby prolonged thirty-eight days to submit a Bill of Exceptions.

*Memorandum.*

April 7, 1909.—Appeal bond approved & filed.

*Memorandum.*

Time to settle exceptions extended to June 1, 1909, and time to file record in Court of Appeals extended to and including July 1st, 1909.

Supreme Court of the District of Columbia.

SATURDAY, May 29th, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

No. 50368. At Law.

JEANETTE COHEN and LILLIE COHEN, Plaintiffs,

*vs.*

EDMUND K. FOX, Trading under the Name and Style of A. F. Fox Company, Def't.

By Judge ANDERSON: The Court having this day signed the Bill of Exceptions taken at the trial of this cause, now orders the same of record *nunc pro tunc*.

10

*Bill of Exceptions.*

Filed May 29, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50368.

JEANETTE COHEN and LILLIE COHEN, Plaintiffs,

*vs.*

EDMUND K. FOX, Trading under the Name and Style of A. F. Fox Company, Defendant.

Be it remembered, that the above entitled case came on for trial before Mr. Justice Anderson and a jury on March 17, 1909, Messrs.

Colbert and Brady appearing for the plaintiffs, and P. H. Marshall for the defendant.

Thereupon the plaintiffs, to maintain the issues on their part joined, offered as a witness Miss LILLIE COHEN, one of the plaintiffs, who being duly sworn, testified that prior to and on May 22, 1907, she and her sister, Jeanette Cohen, were the owners in fee simple of lot No. 182 in Square 444, improved by premises No. 602 R Street, Northwest, Washington, D. C. That shortly prior to said date there had appeared in one of the local papers an advertisement which stated in substance that the party advertising, whose name was not given, desired a house in the neighborhood of the O Street Market, and that the witness on behalf of herself and sister answered by letter said advertisement, offering to sell the above mentioned property. That thereafter one George W. Summers

11 appeared at their house and stated that he was a real estate salesman in the employ of the defendant, who carried on a real estate business in the District of Columbia, and that he (Summers) would like to sell the plaintiff's property for them, and would like them to permit him to list their property with the defendant for sale. Plaintiffs stated to him that they had already given Mr. William D. Sullivan, another real estate broker in this City, an option on the property, but that Summers might list this property with defendant and they would consider any offer he might make.

Shortly thereafter Summers called at 602 R Street, Northwest, where plaintiffs resided, with a man, and asked permission to show him through as a prospective purchaser, which permission plaintiffs granted. That after his companion had left, Summers, who remained behind, in response to questions asked him by the witness, stated that the party whom he had shown through the house was John Milton Waldron, a colored minister, who had recently been called to this City as pastor of a large colored church, that Summers believed he was a responsible man, that he was "all right" in every respect, and that he (Summers) was trying to sell plaintiffs' house to said Waldron. Witness further stated that neither she nor her sister had ever seen Waldron before, and knew nothing about him except what they were told by Summers. That subsequently a contract in writing for the purchase of plaintiffs' said property by Waldron was brought to plaintiffs by Summers, to be signed by them, which contract they referred to their attorney to learn whether

12 it was all right for them to sign it, and were advised that owing to the fact that the will of their deceased sister, Fannie Cohen, who had been an owner of an undivided one-third interest in the property, had not been admitted to probate, they could not deliver a good title within the time limit of the proposed contract, but their attorney prepared a similar contract and inserted therein a clause regarding the will of Fannie Cohen, which contract was signed by plaintiffs and Waldron, said contract being offered and received in evidence, and being in the following words and figures:



\$100.

WASHINGTON, D. C., May 22nd, 1907.

Received of John Milton Waldron a deposit of One hundred and no/100 (\$100.00) Dollars to be applied as part payment in the purchase of lot # 182 in Square # 444, with improvements thereon, known as # 602 R Street, N. W., in the City of Washington, District of Columbia. The purchaser is required to make full settlement in accordance with the terms of sale on or before sixty days from this date, or the deposit will be forfeited, and in the event of the will of Fannie Cohen not being admitted to probate and record by said date, then the devisees under her will agree to surrender possession of said premises to purchaser who agrees to accept them and the deed, purchase money and notes for deferred purchase money, are to be held in escrow by John J. Hamilton until said will is admitted to probate and record, when the deed and deed of trust are to be recorded and the cash turned over to the sellers.

13 Price of property Fifty six hundred and no/100 (\$5,600.00) dollars.

Terms of sale Six hundred and no/100 (\$600.00) dollars, cash payment;—balance, Five thousand and no/100 (\$5,000.00) dollars give my note for Four thousand and no/100 (\$4,000.00) dollars for five years, with interest at the rate of 5% per annum until paid, payable semi-annually, secured by first deed of trust on above described property, for remaining balance of One thousand and no/100 (\$1,000.00) dollars, give my 8 notes for one hundred and twenty five dollars each (\$125.00) payable semi-annually until paid.

Secured by second deed of trust on the above described property, with interest at the rate of six per cent., per annum until paid, payable semi-annually.

Property sold free of encumbrance.

Title to be good of record or deposit refunded and sale declared off: Deposit to be refunded is to include \$100 plus \$500 purchase money and notes for deferred purchase money. Interest on trusts, rents, insurance and taxes to be adjusted to date of transfer.

Examination of title and conveyancing at the cost of purchaser. The forfeiture of deposit does not relieve the purchaser of the responsibility to comply with the terms of sale. Deposit to be refunded if offer not accepted by owner. This contract is made subject to approval by owner.

A. F. FOX COMPANY, *Agents*,  
By GEO W. SUMMERS.

14 Approved by  
JEANNETTE COHEN,  
LILLIE COHEN, *Owner*.

Accepted by  
JOHN MILTON WALDRON, *Purchaser*.

That defendant received from Waldron the One hundred dollars deposit referred to in said contract.

That thereafter, on Saturday, June 15, 1907, the plaintiffs, Wal-



dron, Summers and Mr. Edmund Brady, who represented Mr. M. J. Colbert, plaintiffs' attorney, met in the office of said Colbert for the purpose of closing the sale. That Waldron demurred to the closing of the sale because there was no abstract of title showing that everything was all right. Summers stated that he, at Waldron's request, had ordered the title from the company "up the street," and it would be ready in a few days, and Waldron thereupon was satisfied on this point. Summers then produced the deed and deeds of trust, which Waldron had employed him to prepare after the execution of the contract of May 22, 1907, and when the plaintiff Lillie Cohen read them she discovered that her given name had been spelled "Lily." Mr. Brady said that made no difference, but that if she wished, an erasure could be made and the proper spelling inserted in the papers; that Mr. Brady started to make the necessary erasures, when he discovered that the wife of the said Waldron, who was named as a party to the deeds of trust, was not present. Mr. Brady asked Waldron if his wife was to be present that day and Waldron replied no. Whereupon Mr. Brady stated that the settlement  
15 had better go over until the Monday afternoon following, at four o'clock, to which suggestion all parties present, including Summers, agreed. Mr. Summers stated that he would have the necessary corrections made in the papers by the person who prepared them. That plaintiffs worked hard all that day (Saturday), and had all of their belongings out of the house by nightfall.

That on the following Monday, the witness, a public school teacher, was called up on the telephone by Summers, who stated to her that Waldron had informed him that on the previous day Waldron had taken his wife through the home, and that she had found it too small for her purposes, and that accordingly he had decided not to complete his purchase and that he would forfeit his deposit. That in fact Waldron never completed his purchase, and plaintiff thereafter demanded of defendant the One hundred dollars deposit, but defendant refused to surrender the same, and that neither witness nor her sister have ever received said deposit or any part thereof.

Thereupon the plaintiffs, further to maintain the issues on their part joined, introduced as a witness the plaintiff JEANNETTE COHEN, who being duly sworn, testified in substance to the same facts as her sister and co-plaintiff Lillie Cohen.

Thereupon the plaintiffs further to maintain the issues on their part joined, introduced as a witness EDMUND BRADY, who testified that he is a member of the Bar of the District of Columbia, and in the employ of Mr. M. J. Colbert, counsel for plaintiffs, and so employed at the time of the attempted sale to Waldron of the  
16 property in question. That it was witness who had prepared the contract of May 22, 1907, in doing which he had followed a regular form contract of the defendant, and had added thereto the clause regarding the admission of the will of Fannie Cohen to probate. That he was present on Saturday, June 15, 1907,

when the parties met to close the sale, his testimony as to what took place at that meeting being, in substance, the same as that of the witness Lillie Cohen. That after the decision of Waldron to forfeit his deposit had been communicated to witness by Summers on Monday, June 17, 1907, witness went upon several occasions, to the house where Waldron was living, but could never find him in, that witness investigated the financial status of Waldron with a view to bringing a suit against him on behalf of plaintiffs, but could find no real estate or other assets belonging to Waldron subject to execution. That about a month thereafter the witness noted that a deed had been placed upon the land records conveying to Waldron's wife a house in this City; that witness advised plaintiffs that a decree or judgment against Waldron would be worthless, and that there was no use throwing good money after bad; which testimony as to his investigations as to Waldron's financial responsibility and the result thereof was admitted in evidence over the objection of Counsel for the defendant on the ground of immateriality and incompetency, to which admission in evidence of said testimony exception was then and there taken by Counsel for defendant, and said exception was then and there noted upon the minutes of the presiding Justice before the jury retired to consider of their verdict.

That Irving Williamson, Esq., attorney at law represented  
17 said Waldron in the subsequent negotiations concerning the sale and the deposit made by Waldron.

Plaintiffs also introduced in evidence the following letters:

JUNE 21ST, 1907.

Rev. John H. Waldron, 1907 "L" Street, Northwest.

DEAR SIR: I am informed by my clients, the Misses Cohen, that you have refused to carry out the contract entered into between them and you to purchase house 602 R Street, Northwest, and have stated that you will forfeit your deposit. I desire, however, to call your attention to the fact that the contract of sale expressly provided that the forfeiture of deposit shall not relieve the purchaser from complying with his contract. The Misses Cohen, as you know, in order to give you possession of this property on Monday last, went to the trouble and expense of moving therefrom, of selling considerable of their furniture which it was impracticable for them to carry into a small flat, and have otherwise suffered great damage. They stand ready and willing to carry out their part of the contract, and in evidence of their good faith in the matter will place in the hands of Mr. John J. Hamilton a deed to you covering the property as provided in the contract. If you do not carry out the agreement entered into by you, I shall be forced to bring suit against you.

Yours very truly,

EDMUND BRADY.

18

WASHINGTON, D. C., *June 22, 1909.*

Messrs. Hamilton and Brady, Century Building, Washington, D. C.

GENTLEMEN: Yours of June 21st has been referred to my attorney, Thomas Walker, Esq., 506 Fifth Street, N. W., City.

I am yours very truly,

J. MILTON WALDRON.



WASHINGTON, D. C., *July 6, 1907.*

Messrs. Hamilton & Colbert, Century Building, City.

GENTLEMEN: Replying to your favor of July 3rd, we have to advise you that we have carefully gone over the question discussed therein with our attorney, Mr. P. H. Marshall, in the Columbian Building, and he has directed that we refer any communications to him which we may receive bearing upon the subject.

We have therefore handed your letter to him and request that you interview him regarding the subject of your communication.

Yours very truly,

A. F. FOX COMPANY,  
By E. K. FOX.

JULY 29, 1907.

Edmund Brady, Esq.

DEAR SIR: In reply to your letter of June 21st to Mr. Waldron, I have to say, in his behalf, that his offer to forfeit the deposit  
19 was simply by way of compromise, and to avoid litigation and that he is entitled to a return of his deposit and has so notified A. F. Fox Company.

I am further instructed to say that he denies any liability to your clients.

Yours truly,

IRVING WILLIAMSON.

JULY 29TH, 1907.

Mr. Irving Williamson, City.

DEAR SIR: Replying to your letter of July 29th, to our Mr. Edmund Brady, in regard to the deposit made by Mr. Waldron on the Cohen property, we have to advise that Mr. Waldron is incorrect in saying that he offered to forfeit his deposit by way of compromise. There never was any offer of forfeit or any proposition of compromise. Mr. Waldron called at this office at our request for the purpose of closing the sale. He was to give a deed of trust for the deferred purchase price. The Misses Cohen were here ready and willing to close the transaction, but Mr. Waldron neglected to bring his wife with him to sign the deed of trust, and for this reason and no other the closing of the sale had to be postponed.

A subsequent appointment was made for a few days later, but in the meantime Mr. Waldron notified our clients that his wife  
20 upon going through the house had decided that it was too small for her purposes, and that he, therefore, would refuse to comply with the terms of sale and would forfeit his deposit. Upon receipt of this information we immediately advised Mr. Waldron and the A. F. Fox Company, who were acting as his agents, that the contract provided that the forfeiture of the deposit would not relieve the purchaser from the obligation of complying with the terms of sale. We took this action so that our clients would not be prejudiced in the matter of bringing suit against Waldron for the damages they have suffered.

We have also made formal demand on the A. F. Fox Company for the amount of the deposit, but owing to the absence of Mr. A. F.

Fox, nothing has been accomplished in that direction; and as soon as he returns to the city we intend to bring suit against his Company for said deposit.

Yours very truly,

HAMILTON, COLBERT,  
YERKES AND HAMILTON,  
By JOHN J. HAMILTON.

J. J. H./H.

And there the plaintiff- rested.

Whereupon the defendant to maintain the issues upon his part joined, called GEORGE W. SUMMERS, who being duly sworn, testified in substance as follows: That he is a real estate salesman in the employ of defendant and as such conducted for defendant the negotiations between plaintiffs and Waldron. That he introduced Waldron to plaintiffs, as a prospective purchaser of their said property a week or two prior to the execution of the contract of May 21 22, 1907. That he has been engaged in the real estate business in Washington, D. C., for about eight years last past, and is familiar with the customary and usual commissions paid to real estate brokers for the negotiations of sales of real estate; that in the absence of a special contract fixing the compensation of the broker, such customary and usual commission is three per centum upon the agreed purchase price of the property and that there was no special contract fixing the compensation to be paid to the defendant in this case, and that three per centum of the purchase price agreed to be paid by Waldron for plaintiffs' property is the reasonable value of defendant's services for negotiating said sale between plaintiffs and Waldron. That defendant has never been paid any fees or commissions in this case. That witness had taken a Mrs. Jeffries to the house and had shown it *it* her by permission of plaintiffs, before he took Waldron there, but the property did not suit Mrs. Jeffries. That witness learned that the property was on the market through a friend, who had advertised for a house and had received a reply from plaintiffs. That on Monday, June 17, 1907, witness called Waldron by telephone to remind him to be ready to settle the sale that afternoon, and was then told by Waldron that his wife was not satisfied with the property, and that Waldron would not go on with the transactions, which statements of Waldron witness at once communicated to plaintiffs and to their attorney.

And there the defendant rested.

Whereupon counsel for defendant moved the Court to direct the jury to return a verdict for defendant, upon the plea of set off, upon all the evidence, which motion was overruled, to which ruling exception was then and there taken by counsel for defendant and said exception was then and there noted upon the minutes of the presiding Justice before the jury retired to consider of their verdict.

Whereupon counsel for defendant prayed the Court to instruct the jury as follows:



## 1.

The jury is instructed that upon all the testimony in this case, they must return a verdict in favor of the defendant upon the plea of set-off.

## 2.

The jury is instructed that there is no evidence in this case which will justify them in finding that Waldron was financially unable to comply with the terms of the contract entered into by him with the plaintiffs for the purchase of the house of plaintiffs involved herein.

## 3.

The jury is instructed that if Waldron at the first meeting of the parties held to consummate the sale of the house owned by the plaintiffs to him, had paid the first installment of the purchase price as provided for in the contract of sale, and had given the deed of trust and notes for the deferred payments, as provided in said contract, his subsequent failure to pay said notes would not have affected defendant's right to commission on said sale; and in this connection the jury is instructed that the law does not require a wife to join in a deed of trust securing deferred payments of purchase money, and  
23 such deed of trust executed by the husband alone does not render the property subject to any dower or interest in his wife.

But the Court refused each of said instructions, to which refusal counsel for defendant then and there excepted, and said exceptions were then and there duly noted upon the minutes of the presiding Justice before the jury retired to consider of their verdict.

And the Court thereupon instructed the jury as follows:

"Gentlemen of the jury, the plaintiff brings this suit against Edmund K. Fox, trading under the name and style of A. F. Fox Company to recover one hundred dollars which was deposited with him by John Milton Waldron as an earnest of good faith on his part to carry out the contract of purchase of the premises in question—deposited under the condition that if he did not carry out his contract it would be forfeited—to the owners, the plaintiffs in this case.

"The defendant says that the plaintiffs are not entitled to recover this one hundred dollars because the defendant has performed his part of the contract, that is because he procured a purchaser of the property; and that not only is the plaintiff not entitled to this one hundred dollars, but is liable to the defendant for three per cent. commission on the price that Waldron agreed to pay for the property.

"Now, all that is necessary to entitle a broker to recover his commission for a sale of property is for him to find a purchaser who is ready, willing and able to carry out his contract for the purchase of the property upon the terms named by the owner, so that  
24 when this contract was signed and approved by these parties—then the defendant would be entitled to a commission if this man Waldron was such a purchaser as falls within the definition that I have given, that is, one who was ready, willing and able to

carry out the contract to take the property upon the terms named. So that the only question you have to decide here is whether Waldron was such a purchaser as I have defined—one ready, willing and able to carry out his contract. If he were ready and willing to carry it out, but was not able to, then the defendant would not be entitled to commissions—the broker would not be entitled to a commission.

“Three things must concur: he must not only be ready and willing, but he must also be able, so that if he were ready and willing to carry it out, but was not able to do it, then the defendant would not be entitled to commissions, or if he were able to do it, but was not ready and willing—if he refused to do it—then the defendant would not be entitled to commissions.

“They met, according to the testimony, on Friday or Saturday, for the purpose of closing the contract. There are certain reasons suggested, which have been made plain to you in the course of the testimony, why the closing of the contract to buy was postponed. Now, it does not make any difference for what reason the closing of that contract may have been postponed, if the purchaser consented to it, or, in other words, if it were actually agreed that it should be postponed, as for instance, in order that the purchaser’s wife might be present to sign the deed, or, to illustrate; in order that he  
25 might have until Monday to examine the plaintiff’s title to the property, and he therefore agreed to it, and it turned out that the title was not good, then the purchaser would not be obliged to take the property.

“Now, if you are satisfied that Waldron at this meeting on Friday or Saturday, as the case may be, was there expecting to close the matter, and consented that it go over until Monday and should be closed then, and when Monday arrived he refused to take the property, then the broker would not be entitled to a commission at all, and in that view of the case your verdict must be for the plaintiffs for one hundred dollars, and if you find for the plaintiffs, that is, that this one hundred dollars is due the plaintiffs, you haven’t anything to do with the commissions thereon to the broker, because the broker would not be entitled to any commissions upon the one hundred dollars, as the contract was that it should be forfeited to the owner. He would only be entitled to a commission in the event that Waldron was ready, willing and able to take the property, as I have already stated.

“I think that is all I care to say to you, gentlemen; you may retire.”

To which instruction counsel for defendant then and there excepted and said exception was duly noted upon the minutes of the presiding Justice before the jury retired to consider of their verdict.

Be it further remembered that each of the foregoing exceptions to the rulings of the Court mentioned in this bill of exceptions was separately and severally made and taken at the time of said  
26 ruling excepted to, and before the jury retired to consider of their verdict; that the presiding Justice at the trial of this cause noted the same in his minutes at the time of the taking of the same, and that now in order to make said exceptions a part of the



record so that defendant may have this case reviewed on appeal by the proper Court, defendant moves the Court to sign this his bill of exceptions to have the same force and effect as if each and every one of said exceptions had been embodied in a separate bill of exception, which motion is granted by the Court; and thereupon defendant tenders this, his bill of exceptions and requests the Court to sign the same according to the statute in such case made and provided, which is accordingly done, now for then, this 29th day of May, A. D. 1909.

THOS. H. ANDERSON, *Justice*.

27      *Directions to Clerk for Preparation of Transcript of Record.*

Filed June 2, 1909.

In the Supreme Court of the District of Columbia.

At Law.    No. 50368.

JEANNETTE COHEN and LILLIE COHEN, Plaintiffs,

*vs.*

EDMUND K. FOX, Trading as A. F. Fox Company, Defendant.

The Clerk will please prepare transcript of record for the Court of Appeals in the above case, to include the following:

Summons and return before Justice of the Peace; declaration and bill of particulars; defendant's pleas and particulars of indebtedness; docket entries and certificate of Justice of the Peace on appeal, and endorsements thereon; appearance for plaintiffs in Supreme Court, District of Columbia; memo. of jury trial and verdict, motion for new trial; order of remittitur and assent thereto, overruling of motion for new trial and judgment, appeal noted in open court, term prolonged thirty-eight days, and appeal bond approved and filed; memo. of extension of time to settle bill of exceptions and to file transcript of record in Court of Appeals; bill of exceptions; order to prepare transcript of record.

P. H. MARSHALL,  
*Attorney for Defendant.*

O. K.

M. J. COLBERT.

28      Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 27, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50368 at Law, wherein

Jeanette Cohen and Lillie Cohen are Plaintiffs and Edmund K. Fox, trading and doing business under the name and style of A. F. Fox Company is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of June, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2038. Edmund K. Fox, trading, &c., appellant, *vs.* Jeannette Cohen *et al.* Court of Appeals, District of Columbia. Filed Jun- 28, 1909. Henry W. Hodges, clerk.



ADDITION TO RECORD PER STIPULATION OF COUNSEL.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2038.

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EDMUND K. FOX, TRADING UNDER THE FIRM NAME  
AND STYLE OF A. F. FOX COMPANY, APPELLANT,

vs.

JEANETTE COHEN AND LILLIE COHEN.

FILED JULY 16, 1909.

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In the Court of Appeals of the District of Columbia.

No. 2038.

EDMUND K. Fox, Trading under the Firm Name and Style of A. F.  
Fox Company, Appellant,

vs.

JEANETTE COHEN and LILLIE COHEN, Appellees.

*Stipulation.*

For the purpose of correcting the transcript of the record in this cause, and of curing a diminution thereof, it is stipulated and agreed by counsel for appellant and appellees herein that the Certificate of the Justice of the Peace on Appeal, Record, page 4, is incorrect in that it appears therefrom that there is but one surety on the undertaking on appeal from said Justice of the Peace, whereas, in fact, there are two sureties on said undertaking, viz: Albert F. Fox and Fred R. Walker.

It is further agreed that this stipulation shall be printed as a part of the record herein.

M. J. COLBERT,  
*Attorney for Appellees.*  
P. H. MARSHALL,  
*Attorney for Appellant.*

[Endorsed:] Court of Appeals, D. C. No. 2038. Edmund K. Fox, trading under the firm name and style of A. F. Fox Company, appellant, vs. Jeanette Cohen and Lillie Cohen. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Jul- 16, 1909. Henry W. Hodges, clerk.